STATE OF MICHIGAN

COURT OF APPEALS

NANCY POSSELIUS, Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,	UNPUBLISHED April 17, 2014
v	No. 306318 Macomb Circuit Court
SPRINGER PUBLISHING COMPANY, INC., Defendant/Counter-Plaintiff-Appellant/Cross-Appellee,	LC No. 2009-003401-CD
and WILLIAM L. SPRINGER II, Defendant-Appellant/Cross-Appellee.	

Before: MURPHY, C. J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. (*dissenting*)

I respectfully dissent, because I do not believe that the six-month limitations period applies to plaintiff's claim under the circumstances of this case. Under the circumstances, however, I decline to address the remaining issues raised on appeal.

Plaintiff began working for SPC in 2000. In 2005, plaintiff was given a revised policy manual and, either at the same time or attached thereto, an acknowledgement form. The policy manual[1] appears to consist of twelve numbered pages covering seventeen topics, all enumerated in a table of contents. The parties dispute whether the form was attached as a thirteenth page, although the twelfth page of the manual explicitly states that it is the end of the policy book. The manual does not list the form in its table of contents, but it does reference the form once, stating that "[b]y signing for the receipt of this policy book, you are acknowledging that you understand the at-will nature of your employment." The form itself provided:

[1] Also referred to, seemingly interchangeably, as a "policy book" or a "policy guide."

> [1] I hereby acknowledge that this Policy Book has been received, read and understood . . .
>
> [2] I understand that this manual is not intended to be a contract, but is provided as a general explanation of policies which the Company uses as guidelines in its decision making process.
>
> [3] I understand it is my responsibility to update this guide as soon a replacement pages are distributed.
>
> [4] In the event that I am ever employed in a management capacity for the Company, I understand it is my responsibility to understand, execute and enforce the policies and procedures established in this Policy Book to the employees under my direction.
>
> [5] I agree to conform to the rules and regulations of the Company and understand that my employment can be terminated at any time . . . at the option of either the Company or myself. This at will employment relationship can be modified only through a written modification approved by the Publisher.
>
> [6] I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

Plaintiff's employment ended in July 2008. Plaintiff filed suit a year later in July 2009.

Defendants moved for summary disposition on the ground that plaintiff's action was barred by the alleged six-month contractual limitations period. The trial court denied the motion, ruling that the acknowledgment form was ambiguous because: (1) it was unclear whether the "Revised Policy Book" plaintiff submitted was the "Policy Book" referenced in the acknowledgement form;[2] (2) it was unclear whether the phrase "this manual" as used in the second paragraph of the acknowledgment form referred to the policy book, to the acknowledgment form, or to both; and (3) it was unclear whether the acknowledgement form was part of the revised policy book or was a separate document. The trial court denied defendants' motion for a directed verdict at trial for the same reasons. The jury was not asked to resolve those alleged ambiguities, but rather was asked to determine in the abstract whether

[2] The evidence at trial indicated that the "Policy Book" referenced in the acknowledgement form was the policy book admitted into evidence.

plaintiff agreed to be bound by the six-month statute of limitations rather than the time limit set forth under Michigan law. The jury answered in the negative.

The trial court's ruling on a motion for a directed verdict is reviewed de novo on appeal. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). This Court must review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if the evidence so viewed fails to establish a claim as a matter of law. *Id.* "The interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). This Court will affirm a trial court's decision if it achieved the correct result, even if the decision was based on a wrong reason. *Adams v West Ottawa Pub Schools*, 277 Mich App 461, 466; 746 NW2d 113 (2008).

If the parties to a contract dispute its terms, the "court must determine what the parties' agreement is and enforce it." *G&A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). However, the parties agree that the policy manual does not constitute a contract. It is also beyond dispute that the acknowledgement form clearly and unambiguously purports to require plaintiff to file suit within six months after the date of the employment action giving rise to the suit. The parties' dispute is whether: (1) the form is part of the manual, or (2) the form independently constitutes a binding contract. If the former is answered in the affirmative, the six-month limitations period is obviously not binding, because the manual is agreed not to be a binding contract. In my opinion, the form would not constitute a binding contract on its own, so it is unnecessary to resolve that first dispute. I also need not, and do not, address the parties' arguments pertaining to whether a six-month limitations period contravenes public policy.

It is axiomatic that an essential element of a valid contract is mutuality of obligation. *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). "In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality." *Wilkinson v Heavenrich*, 58 Mich 574, 577; 26 NW 139 (1886). A lack of mutuality is only fatal to a contract "if lack of mutuality amounts to a lack of consideration." *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 600 n 7; 292 NW2d 880 (1980). Counsel for defendants repeatedly stated during oral argument that a party is not contractually obligated if the purported contract agrees to some kind of performance "if I feel like it." I agree.

In *Toussaint*, our Supreme Court held that an employment contract was not void for want of consideration merely because of the indefiniteness of a term of employment. Notably, however, the employment contracts at issue in that case had *some* genuine guarantees by the employers: a minimum term, minimal standards for termination, or similar promises that gave the employees some measure of job security. *Toussaint*, 408 Mich at 610-611. A contract may have mutuality despite termination being at the employer's will. *Id*. at 612. Obviously, an employer may make some other kind of guarantee to its employees. Indeed, this Court has even held that the act of employing someone may constitute sufficient consideration for an agreement

to limit a limitations period under the circumstances of an employment application. *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001).[3] Nevertheless, our Supreme Court has held that a document stating that not only was it not a contract, but also that the employer could terminate the employee at any time for any reason and modify any of its policies on a whim at any time all showed that the employer "did not intend to be bound to any provision" therein, so it did not create an enforceable agreement. *Heurtebise v Reliable Business Computers*, 452 Mich 405, 413-414; 550 NW2d 243 (1996).

Courts look beyond specific words and phrases; the substance of what a document actually *does* is at least as important as what it states it does. See *In re Traub's Estate*, 354 Mich 263, 279; 92 NW2d 480 (1958) ("It has been many years since courts have allowed the garb of words to cloak the substance beneath, either converting the crafty to the cloth or investing the good with the attributes of evil."). Contracts must be interpreted on the basis of the words actually and plainly used within the contract. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). However, the legal significance of a provision or document is for the courts to determine, including whether a label affixed by the parties is accurate. See *Jaquith v Hudson*, 5 Mich 123, 138 (1858); see also *Smitter v Thornapple Twp*, 494 Mich 121, 133 n 25; 833 NW2d 875 (2013) (distinguishing between stipulations of fact, which bind the courts, and stipulations of law, which do not). Contractual interpretation is a question of law. *DaimlerChrysler Corp*, 260 Mich App at 184-185. Consequently, the fact that the parties *state* in a document that it is or is not a contract is relevant, but not necessarily dispositive if the plain language of the remainder of the document clearly and unambiguously evidences that it *functions as* something else.

Presuming the acknowledgement form here to be independent of the policy manual, the form does not explicitly say whether it is or is not a contract. In that regard, it is distinguishable from the document at issue in *Heurtebise*. However, the document, when read as a whole, clearly indicates that any promise to continue plaintiff's employment is strictly "if I feel like it." It is an illusory promise: the effect of the form is to inform the signer that failing to agree will result in termination, but termination might occur even if the signer agrees. No other possible consideration is suggested. This document is also distinguishable from the document at issue in *Timko*, which was an application for employment that I presume this Court construed as an offer seeking acceptance by performance.[4] The form here is nothing more than a reiteration that plaintiff was an at-will employee, and defendants had precisely no obligations to her whatsoever. I conclude that defendants' lack of obligation under the terms of the acknowledgement form is so profound as to constitute a complete failure of consideration. Consequently, the acknowledgement form is not a contract.

I recognize that a panel of this Court has previously stated that "[m]ere continuation of employment is sufficient consideration to support a noncompete agreement in an at-will

[3] I believe *Timko* misreads *Toussaint*, particularly in light of *Heurtebise*, but *Timko* does not affect how I would resolve the instant appeal.

[4] Again, I do not believe *Timko* correctly read our Supreme Court's precedent, but the context in that case is so easily distinguishable that it is of no effect here.

employment setting." *QIS, Inc v Indus Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004). However, *QIS* made that statement in dicta, going on immediately to note that the issue had actually been whether the situation in that case amounted to "just cause." *Id*. The statement was unnecessary to determine the case, consequently it was obiter dicta and not binding. See *Wold Architects and Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006). Furthermore, *QIS* merely cited a Federal District Court case, *Robert Half Int'l, Inc v Van Steenis*, 784 F Supp 1263, 1273 (1991), which is itself not binding on this Court. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Finally, the Federal District Court relied for its statement on precedent from the Court of Appeals of Iowa, *Insurance Agents, Inc v Abel*, 338 NW2d 531 (Iowa App, 1983), which also may be enlightening but is not binding on this Court. See *Goodell v Yezerski*, 170 Mich 578, 579-580; 136 NW 451 (1912); *Continental Cablevision of Michigan, Inc v City of Roseville*, 430 Mich 727, 741 n 16; 425 NW2d 53 (1988). I conclude that the statement from *QIS* does not dictate any particular outcome in the instant matter.

In *In re Certified Question*, 432 Mich 438, 441, 455; 442 NW2d 112 (1989), although addressing a different factual and legal context, our Supreme Court held that "[a]n employer may, without an express reservation of the right to do so, unilaterally change its written policy from one of discharge for cause to one of termination at will, provided that the employer gives affected employees reasonable notice of the policy change," and that an impermanent job commitment could still have value. Our Supreme Court further noted that a typical employment contract is, at its simplest, a unilateral one, and if the act the employee performs in exchange for the employer's promise of payment "is simply a day's work (for a day's wage)," then obviously the employer needs do no more than pay out at the end of that day. *Id*. at 446-447. Nonetheless, the Court noted that the real world generally does not operate in such a manner. *Id*. at 447. The Court concluded that employers were permitted to rescind discharge-for-cause policies in part because "policies" are expected to be flexible and because a less-than-permanent job commitment is not necessarily "without meaning or value." *Id*. at 455-456.

The primary consideration in *In re Certified Question* was under what circumstances an employer could rescind a for-cause termination policy, and the Court held that the employer could only do so if it gave adequate notice to the employees and did so in good faith (e.g., not rescinding it for a day to fire one individual and then reinstating it). Of significant note, the Court essentially held that a rescindable promise is not necessarily illusory as long as that promise is kept while it is in force and the rescission thereof is adequately noticed. Indeed, as I note *supra*, a contract is perfectly capable of having mutuality despite being at will. I do not agree with the majority that it necessarily does. The Court explicitly stated that its "answer might be different" if the employer purported to unilaterally change something that would "affect employee benefits already accrued or 'vested.'" *Id*. at 457 n 17. The "right not to be discharged except for just cause" cannot be an accrued or vested right. *Id*.

Nonetheless, rescinding a for-cause policy essentially devolves a contract of employment from a bilateral contract to a unilateral contract. The Court explained that "[a] unilateral contract is one in which the promisor does not receive a promise in return as consideration." *In re Certified Question*, 432 Mich at 446. Under such a contract, "the employer's promise constitutes the terms of the employment agreement; the employee's action or forbearance in reliance upon the employer's promise constitutes sufficient consideration to make the promise legally binding,"

so there "is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor." *Id*. at 446. Rescinding a for-cause policy is essentially rescinding one of several promises made by an employer; thereafter, there always remains the baseline mutuality of an agreement to employ (or pay) in exchange for an agreement to be employed (or do work).

Obviously, the now-at-will employee is free to discontinue working if he or she deems that remaining promise to be no longer sufficient. Critically, however, that is turned on its head under the circumstances of this case. Instead of an employer rescinding a promise that is inherently not expected to be entirely permanent in the first place, the situation at bar involves taking an existing unilateral contract, and in exchange for *nothing whatsoever*, requiring the employee to make an additional promise of his or her own beyond merely performing in execution of that unilateral contract. Again, under these circumstances, I believe that there is such a profound lack of obligation on the employer's part that there has been a complete failure of consideration. While I agree with the majority's observation that Michigan case law does not "support" this conclusion to the extent that I find no case law explicitly dictating it, I also find no case law precluding it, and ample authority for finding it not only legal but just.

The parties raise a number of other issues on appeal that the majority properly deems unnecessary to address in light of its conclusion about the significance of the acknowledgement form. For the reasons stated above, I respectfully disagree with the majority's conclusion that the alleged six-month limitations period is binding. However, I agree that in light of the majority's conclusion in that regard, and consequently the outcome of this appeal, it is unnecessary at this time to address the remainder of the parties' arguments. I therefore decline to do so.

/s/ Amy Ronayne Krause